Darshan Singh Khaira v Enbishi (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 17-5 OF 1998
AZMEL, SELVENTHIRANATHAN AND HASHIM JJ
13 NOVEMBER 1998

Legal Profession *— Duty to court — Duty to conduct case fairly and honestly — Failure of counsel to disclose existence of earlier order granted in another proceeding which was material for consideration in ex parte application — Whether failure amounted to breach of duty to conduct case fairly and honestly — Legal Profession (Practice and Etiquette) Rules 1978 rr 12, 17, 16 & 31*

Legal Profession *— Professional discipline — Misconduct — Breach of duty to conduct case fairly and honestly — Failure of counsel to disclose existence of earlier order granted in another proceeding which was material for consideration in ex parte application — Whether failure amounted to misconduct — Legal Profession (Practice and Etiquette) Rules 1978 rr 12, 17, 16 & 31*

Legal Profession *— Professional discipline — Suspension from practice — First offender — Breach of duty to conduct case fairly and honestly — Whether suspension order was excessive*

It was the finding of the Investigating Tribunal that the appellant had knowingly failed to set out or disclose the existence of an order of court granted in another proceeding ('the said order'), which was relevant and material for the consideration of the judge in considering an ex p application made by the appellant on behalf of his clients. This had resulted in the ex parte order being granted and much hardship to the respondent. The appellant had not adduced any reasonable or satisfactory explanation for his conduct. Consequently, the appellant was suspended from practice for six months by the Disciplinary Board for violating rr 12, 16, 17 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). The appellant appealed against the finding of guilt and the sentence.

Held, dismissing the appeal:

(1) The appellant had committed breaches of the Rules. The appellant should have been fully aware that an advocate and solicitor — who is also an officer of the court — should at all times conduct his case fairly and honestly and should not at any time mislead the court. The appellant had deliberately and knowingly failed to disclose the existence of the said order when he applied for the ex parte order (see p 181B–C).

(2) While noting that this was the appellant's first offence, he must be made to realize the consequences of his wrongful acts which were done deliberately and knowingly. The sentence of suspension of six months was not excessive (see p 181E).

A **[Bahasa Malaysia summary**

Adalah pendapat Tribunal Penyiasatan bahawa perayu telah dengan pengetahuan gagal untuk membentangkan atau mendedahkan kewujudan satu perintah mahkamah yang diberikan dalam satu prosiding lain ('perintah tersebut'), yang relevan dan
B materia untuk pertimbangan oleh hakim dalam mempertimbangkan permohonan ex parte yang dibuat oleh perayu bagi pihak anakguamnya. Ini telah mengakibatkan perintah ex parte tersebut diberikan dan kesusahan yang ketara kepada pihak penentang. Perayu telah tidak memberikan sebarang penjelasan yang munasabah atau memuaskan terhadap kelakuannya. Akibatnya,
C perayu telah digantung dari amalan guaman untuk enam bulan oleh Lembaga Tatatertib kerana melanggar kk 12, 16, 17 dan 31 Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 ('Kaedah tersebut'). Perayu telah merayu terhadap pendapat bersalah dan hukuman.

D

Diputuskan, menolak rayuan:

(1) Perayu telah melanggar Kaedah tersebut. Perayu sepatutnya menyedari dengan sepenuhnya bahawa sebagai seorang peguambela dan peguamcara — yang juga merupakan seorang
E pegawai mahkamah — seharusnya pada semua masa mengendalikan kesnya secara adil dan jujur dan tidak seharusnya pada bila-bila masa memperdayakan mahkamah. Perayu telah dengan sengaja dan dengan pengetahuan gagal untuk mendedahkan kewujudan perintah tersebut bila memohon untuk perintah ex parte (lihat ms 181B–C).

F (2) Sementara perhatian diberikan bahawa ini merupakan kesalahan pertama perayu, beliau mesti disedarkan akan akibat-akibat perbuatan-perbuatannya yang salah yang dilakukan secara sengaja dan dengan berpengetahuan. Hukuman penggantungan selama enam bulan adalah tidak keterlaluan (lihat ms 181E).]

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[*Editorial Note*: The appellant has filed an appeal to the Federal Court vide Civil Appeal No 02–13–1998(W). A stay of execution has been granted by the Federal Court on 14 October 1998 pending the appeal by the appellant.]

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Notes

For cases on duty to court, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1451, 1488–1489.

For cases on misconduct, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue)
I paras 1538–1594.

For a case on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1641.

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 12, 16, 17, 31

GG Yeap (Darshan Singh & Co) for the appellant.
Lim Chee Wee (Skrine & Co) for the respondent.

Azmel J: The appellant, an advocate and solicitor, had appealed against the order of the Disciplinary Board dated 28 February 1998 suspending him from practice as an advocate and solicitor of the High Court of Malaya for a period of six months.

The facts of the case had been succinctly stated by the Investigating Tribunal in their report as found on pp 97 to 99 of the appeal record. We unanimously accepted their finding of facts in toto as we found no grounds whatsoever not to agree with them. Based on the facts as found by the Investigating Tribunal we fully agreed that the appellant had committed violations of rr 17 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 as well as rr 12 and 16 of the same Rules. For ease of reference we state below the findings of facts of the Investigating Tribunal.

> The appellant was at all material times the Solicitor on record for Alloy Automative in both the proceedings, vide, Kuala Lumpur High Court Originating Motion No D3–25–8–1994 and Kuala Lumpur High Court Originating Motion No D2–25–2–1995 and had full knowledge of all developments in those two proceedings.
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> The 'ENKEI' trade mark originally registered in the name of Alloy Automative had been expunged from the Register of Trade Marks by the Honourable Justice Dato' VC George by order of court dated 5 October 1994 in proceedings D3–25–8–1994 and therefore Alloy Automative, as a matter of law, was not entitled to be the registered proprietor of the Trade Mark 'ENKEI'.
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> The appellant who drew up all the papers and attended before the Honourable Mr Justice Richard Talalla on 30 January 1995 on the application in proceedings D2–25–2–1995 for a Trade Description Order (TDO), knowingly failed to set out or disclose the existence of the order of court made by Justice Dato' VC George on 5 October 1994 in D3–25–8–1994. It was singularly clear that the said order of 5 October 1994 was relevant and material for the consideration of the judge in considering the application for a TDO.
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> The appellant had not adduced any reasonable or satisfactory explanation for the suppression of this material fact from Mr Justice Talalla when he obtained the ex-parte order (TDO) on 30 January 1995.
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> The TDO was obtained by the appellant on 30 January 1995 on a premise which was false and incorrect in that after 5 October 1994 Alloy Automative could no longer claim to be entitled in law to be the registered owner of the 'ENKEI' mark contrary to what was deposed to in para 3 of the affidavit of Mr Yap Weng Yew in D2–25–2–1995.
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> The appellant had committed a misconduct under the Legal Professions Act 1976 on the following counts:
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> (a) he had breached his duty to be honest at all times to the court in the discharge of his professional duties especially in pursuing an ex-parte order where the court did not have the benefit of the submissions of any interested party.

(b) he had violated rr 17 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 directly and rr 12 and 16 of the same Rules indirectly.

(c) he was guilty of a conduct which was unbefitting of an advocate and solicitor and which was calculated to bring the legal profession into disrepute.

On the basis of facts as found by the Investigating Tribunal we have no doubts whatsoever that the appellant had committed breaches of the said rules of the Legal Practice (Practice and Etiquette) Rules 1978. The appellant who had been in the legal practice for a pretty long period should have been fully aware that as an advocate and solicitor who is also an officer of the court should at all times conduct his case fairly and honestly and should not at any time mislead the court. In this case he had deliberately and knowingly failed to disclose the existence of the order of court given by YA Dato' VC George dated 5 October 1994, when he proceeded to apply for the ex-parte order before YA Tuan Richard Talalla on 30 January 1995 which order was obtained by him. We had no doubt whatsoever that such order would not have been issued by YA Tuan Richard Talalla had the appellant disclosed the existence of the earlier order dated 5 October 1994 given by YA Dato' VC George. We therefore had no reason whatsoever to disturb the finding of guilt of the appellant by the Investigating Tribunal which was subsequently endorsed by the Disciplinary Board.

As to the sentence of suspension of six months imposed by the Disciplinary Board we were unanimous in holding that the sentence was not excessive. While noting that this is his first offence, we were of the view that the appellant must be made to realise the consequences of his wrongful acts which were done deliberately and knowingly. He is not new to this legal profession. As such, we also dismissed his appeal against sentence.

However, on hindsight we regretted for not asking the appellant to show cause why his suspension should not be increased to 12 months having regard to the fact that his actions were not only wrongful and deliberate but had caused so much hardship to the respondents. Having regard to the wrongful and deliberate actions committed by him and the hardship that had been caused to the respondent the six months suspension may appear to be manifestly inadequate. We are of the view that this is an issue which the 'Higher Court' may wish to consider. We use the term 'Higher Court' having regard to the fact that the appellant had filed this appeal in the Federal Court. In our view, it would be more appropriate that this appeal be filed in the Court of Appeal. The propriety of the notice of appeal of the appellant becomes an issue.

Appeal dismissed.

Reported by Tan Kah Bee